IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

TUSCARORA INDIAN NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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I

Respondent's Concession That if a § 4(e) Finding Is Unnecessary the Judgment of the Second Circuit Court of Appeals Is Binding Narrows the Issues on This Appeal But Such Concession Is Not as Extensive as It Should Be Because the Second Circuit Validly Decided All the Issues Later Presented to the District of Columbia Circuit in the Review Proceeding and the Latter Court Should Have Honored the Prior Judgment on Those Issues.

Respondent's brief in footnote 60 (p. 84) states:

> "The most that can be said of petitioner's res judicata argument in this case is that, if the Tuscarora Reservation were not protected by Section 4(e), then the Second Circuit decision to the effect that respondent's property may be condemned under Section 21 would be binding. The court below, however, did not necessarily disagree with this conclusion. R. 430-31; compare footnote 50, *supra*. Furthermore, the point is of little practical value to the Power

Authority where, as here, Section 4(e) prevents the inclusion of Tuscarora lands under the license.'"

Since it is so palpably clear that respondent's land needed for the power project is not part of the public lands and reservations of the United States within the meaning of § 4(e) of the Power Act and that § 4(e) was superseded by the 1957 Act as far as the issuance of a Niagara license is concerned, respondent's concession should dispose of this appeal.

However, since respondent's brief (pp. 80-84) has misinterpreted our argument that it should not be allowed to relitigate issues decided by the Second Circuit and since its concession does not go as far as it should, we wish to call the Court's attention to the facts which follow.*

Of the 1,383 acres of respondent's land needed in connection with the project, 1,262 are needed for reservoir purposes, 35 for a road around the reservoir and 86 for transmission lines. The only part included within the license by the May 5, 1958 order of the Commission was the part needed for the reservoir.** The part needed for the road would probably be included in the license later but the part used for these transmission lines definitely would not. These lines were built to replace other lines owned by the Niagara Mohawk Power Corporation and connect with other Niagara Mohawk lines crossing the reservation. They are not the type of lines which § 3(11) of the Power Act provides shall be part of the project.

In the Second Circuit action it was determined that the 1957 Niagara Redevelopment Act gave the Authority a

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* We put no label on our argument such as *res judicata*, collateral estoppel or estoppel by judgment.

** In the Authority's petition (and supplement to petition) for rehearing on the Commission's February 2, 1959 order finding that use of Tuscarora land would interfere and be inconsistent with the purpose for which the reservation was created or acquired, we erroneously stated that the land needed for the transmission lines and road were included in the license. However, an examination of the Exhibit J which the May 5, 1958 order approved shows that it did not include them (R. 497, 502, 416-418).

right to condemn respondent's land for transmission line purposes, road purposes and reservoir purposes despite the fact that respondent made the same 4(e) argument in the Second Circuit as it later made in the District of Columbia Circuit.*

On the other hand, the later judgment of the District of Columbia Circuit was concerned only with the taking of respondent's land for reservoir purposes. It did not purport to overrule the Second Circuit judgment as far as it related to land needed for transmission lines and roads, none of which is within the licensed project area (R. 285-287, 532-533).

Neither the Commission's January 30, 1958 order granting a superseding license nor its March 21 order denying respondent's application for rehearing included any of respondent's land in the license (R. 400-401, 404, 412-413). In making both orders the Commission in effect told the Authority it would order such inclusion at a later date if the courts held that the Authority had a legal right to use respondent's land. Immediately after the rehearing application was denied, the Authority took steps to precipitate a legal determination of its right to take respondent's land.

At that point respondent was in a position, if it desired to do so, to file a petition for review of the January 30 order either with the Court of Appeals for the District of Columbia Circuit or the Court of Appeals for the Second Circuit and to ask for a stay (§ 313(b) of the Act). Assuming that under § 313(b) as then in force the court would have had jurdisdiction to grant a stay prior to the filing of the transcript, the Authority—contrary to the statement in respondent's brief (p. 81)—as licensee would have been bound by the stay and of course would have honored

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* The opinion of the Second Circuit Court of Appeals indicates that the Court considered this argument and rejected it. The Court stated that under § 4(e), provided a finding were made, a licensee could use *even* lands belonging to the United States. (*Tuscarora Nation of Indians* v. *Power Authority et al.*, 257 F. 2d 855 (2d Cir. 1958) *reh. den.* 257 F. 2d 895, *cert. den.* 358 U. S. 841 (1958) *reh. den.* 360 U. S. 923 (1959).)

it without question even though it was not a party to the review proceedings. The Authority on the other hand would have been able to ask the court to condition the stay upon a speedy resolution of the review proceeding.*

At that point the following priorities governed the Authority's need for the land:

(a) The making of surveys;
(b) The building of transmission lines;
(c) The diversion of creeks;
(d) The building of the reservoir.

The Authority promptly commenced eminent domain proceedings and attempted to survey respondent's land on the basis of a provision of law (N. Y. Pub. Auth. Law § 1005(7)) allowing the making of surveys and investigations in connection with power projects.

Instead of filing a petition to review the January 30 order, respondent obtained a stay from the United States District Court for the Southern District of New York and brought a declaratory judgment and injunction action in that court.**

As stated in our main brief (pp. 11-12), respondent waited until almost the very end of the sixty day period

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* The Authority would not have challenged the court's power to grant a stay if the court thought respondent aggrieved. What the Authority wanted was an expeditious determination of its legal rights.

** Respondent's brief (p. 81, footnote 58), maintains that respondent had no other federal remedy with which to protect its rights. Even though this statement is based on wrong reasons it definitely establishes that the courts of the Second Circuit had jurisdiction to decide the issues presented to them by respondent. Having such jurisdiction the declaratory judgment which resulted from the action there is binding. Even though a statutory review proceeding is provided, if it does not constitute a remedy by which as a practical matter all of a party's rights may be protected, he is entitled to invoke equity jurisdiction. Davis, *Administrative Law Treatise*, Vol. 3 § 23.04, p. 309; *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56, 60 (1938); *United States* v. *Interstate Commerce Commission*, 337 U. S. 426 (1948).

allowed by law to bring a review proceeding and then brought it in the District of Columbia Circuit rather than in the Second Circuit where the declaratory judgment action was pending. In addition, it procured an order from the District of Columbia Circuit setting November 15 as the last day for filing its reply brief in the case and did so before the Authority had an opportunity to intervene.

We do not argue that the Second Circuit judgment decided the validity of the Authority's license. There is no question but that the Court in which the review proceeding was brought is the only court which could do so. The District of Columbia Circuit Court of Appeals obtained exclusive jurisdiction to review the January 30 licensing order upon the filing of the Commission's Transcript of Record after judgment was entered in the District Court action. The main significance of "exclusive jurisdiction" is that if more than one petition for review is filed and filed in more than one court, the court in which the transcript is first filed obtains exclusive jurisdiction to review the whole order. *Pacific Gas and Electric Co.* v. *Federal Power Commission*, 253 F. 2d 536, 540-541 (9th Cir. 1958). For example, the Town of Lewiston which participated in the hearings before the Commission and objected to the location of the reservoir could very well have filed a petition for review of the January 30 order in the Second Circuit.*

We do contend that the Court of Appeals for the District of Columbia Circuit in determining whether or not to affirm, modify or set aside the January 30 order in whole or in part should have honored the judgment of the Second

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* The Commission's May 5 order, which was the only order which included respondent's land in the project, by its terms was to be final unless rehearing were asked within thirty days under § 313(a). Lewiston could have asked rehearing and then sought court review of that order and surely it could not be said that it had forfeited its rights by failing to take similar action with respect to the January 30 order.

Circuit with respect to the issues which were common to the action in the Second Circuit and the review proceeding in the District of Columbia Circuit.*

The District of Columbia Circuit Court of Appeals should not have allowed respondent to play one court against another and to relitigate issues which the Second Circuit decided at respondent's behest and of which respondent alleged in its complaint and stated in a written brief the Second Circuit had jurisdiction.

Respondent by now conceding that if a finding is not required under § 4(e) of the Power Act the Second Circuit judgment is binding says in effect that only the District of Columbia Circuit could determine the necessity of a § 4(e) finding but that the Second Circuit had jurisdiction to decide all other issues.

The Second Circuit determined that by the 1957 Act, Congress authorized the taking of respondent's land for the Niagara project and necessarily determined that § 4(e) of the Power Act was no bar. Thus the Second Circuit determined every issue raised by respondent and the grounds upon which it made the determination are not material. *Angel* v. *Bullington*, 330 U. S. 183, 190 (1947); *Deposit Bank* v. *Board of Councilmen of Frankfort*, 191 U. S. 499, 510-11 (1903); *American Express Company* v. *Mullen*, 212 U. S. 311 (1908).

Even if the Federal Power Commission would not have been bound by the Second Circuit judgment in the event it had been favorable to respondent, respondent having chosen its forum ought not to be allowed to relitigate the same issues in a second United States court.

Tacoma v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958), does not suggest a different result.

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* The Second Circuit Court of Appeals affirmed as modified the district court judgment which was entered before the District of Columbia Circuit got exclusive jurisdiction of the review proceeding by the filing of the Commission's transcript of record.

This court in the *Tacoma* case held that a party to a Federal Power Commission license proceeding whose contentions are overruled by the Commission "may not reserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court—which had 'exclusive jurisdiction' of the proceeding and whose judgment therein as declared by Congress 'shall be final', subject to review by this Court upon certiorari or certification."

In our case there was at least grave doubt that respondent was aggrieved by the January 30 order of the Commission.* Respondent took advantage of the procedure provided by the Declaratory Judgment Act (62 Stat. 694, amended 63 Stat. 964, Title 28 U. S. C. § 2201) and obtained from a court of competent jurisdiction a binding determination of issues upon which the Commission in its January 30 and March 21 orders had refused to rule and also of the § 4(e) issue upon which the Commission did rule.

It remained for the court in which a review proceeding was later brought to determine whether or not to affirm, modify or set aside the January 30 order for any reason but in making such determination that court should not have allowed litigation *de novo* of issues already decided.

The *Tacoma* decision was handed down on June 23, 1958 and respondent's appeal in the declaratory judgment action was argued before the Second Circuit in July. The Power Authority cited the *Tacoma* case to that court for the proposition that § 21 of the Power Act is so broad that a state's property can be condemned by a Federal Power Commission licensee which is a creature of the state against state opposition. Respondent made no suggestion to the court that the *Tacoma* case established the proposition that it lacked power to decide the issues before it.

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* Contrary to the statement in respondent's brief (p. 81) we do seriously contend that respondent was not aggrieved by the January 30 order. See Main Brief, pp. 89, 92.

II.

Contrary to Respondent's Contention the Term "Public Lands and Reservations of the United States" as Used in the Public Land Laws Has Never Been Held to Apply to Land Such as Is Here Involved and Since Respondent Concedes That the Term Has a Similar Meaning in §4(e) of the Power Act It Clearly Does Not Apply to Respondent's Land.

In an effort to show that the term, "public lands and reservations of the United States" as used in §4(e) of the Power Act includes respondent's land needed for the power project even though the United States owns no interest in the land, respondent's brief (p. 65) points out that the term "public lands and reservations of the United States" is also used in the Public Land Laws (Title 43, United States Code) in §§959 and 961 (Act of February 15, 1901, 31 Stat. 790, and Act of March 4, 1911, 36 Stat. 1235), which authorize the granting of rights of way for power and other utility purposes.*

The Authority's Main Brief (pp. 49 and 51) makes the same observation and points out that §§959 and 961 of Title 43 have never been considered to apply to Indian reservation land in New York State and that power lines have been built on respondent's reservation under state law rather than under the authority of those statutes. (See Main Brief, pp. 27-28.)

Respondent on the other hand by citing (p. 66) an opinion of Felix Cohen as Acting Solicitor of the Interior Department in 1942 (58 Decisions of the Interior Dept. 85, 1942) seeks to establish that the Public Land Laws provisions apply to land owned by Indians in fee and that therefore §4(e) similarly applies.

The opinion cited was written in 1942 although in its first paragraph there is an admission that the question which it purported to answer had been moot since 1940.

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* The term is also used in other sections of the Public Land Laws. (See Main Brief, p. 49.)

Although the part of a paragraph of the opinion quoted in respondent's brief gives the impression that the land in question was owned in fee by an Indian Nation it had in fact been allotted in severalty.*

The succeeding paragraph of the opinion—none of which respondent's brief quotes—discussed the fact that the land in question had been allotted and that it was the Department of Interior's position that §§ 959 and 961 of Title 43 applied to it but that the issue was then being litigated.

Six months after the opinion was delivered this court in *United States* v. *Oklahoma Gas & Electric Co.*, 318 U. S. 206 (1943), overruled the Department and held that permission of the Secretary of Interior was not necessary to the

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* The land of Five Civilized Tribes of Oklahoma unlike the land here involved was once part of the federal public domain. It was conveyed to the Indians by patents subject to a reversionary interest in the United States (7 Stat. 478; 9 Stat. 871; 14 Stat. 799). Its use for the common benefit contemplated by the patents did not work out (*Stephens* v. *Cherokee Nation*, 174 U. S. 445, 447-451 (1899)). This led to legislation for the distribution of tribal property by allotment of the lands in severalty (27 Stat. 645; 29 Stat. 321; *Heckman* v. *U. S.*, 224 U. S. 413, 431-2 (1911)). Restrictions on alienation were included in the allotment agreements but provisions were made for condemnation of lands necessary for public improvements "regardless of tribal lines" (30 Stat. 495, 567; 31 Stat. 861; 32 Stat. 43, 500, 716; 34 Stat. 137). Congress has passed many special acts governing the Five Civilized Tribes, *e.g.* creation of the office of Superintendent (25 U. S. C. §§ 25, 25(a)); encumbrances on lands allotted (25 U. S. C. § 86); payments to members from funds of the tribes (25 U. S. C. § 120); expending tribal funds (25 U. S. C. § 124); deposit of funds from sales of lands and property (25 U. S. C. §§ 156, 162); access to records (25 U. S. C. § 199); laws applicable to lands of full blooded members (25 U. S. C. § 355); allowances of claims of restricted allottees (25 U. S. C. § 356); determination of heirship (25 U. S. C. §§ 375, 375(a) (b) (c)); lease of restricted lands (25 U. S. C. 393(a)); the sale of restricted lands (25 U. S. C. § 409(a)); reservation of minerals in sale of tribal lands (25 U. S. C. § 414); promotion of welfare (25 U. S. C. §§ 501-510).

building of power lines over allotted land even though the Government held title in trust to prevent improvident alienation.

This Court pointed out that if a telephone line were built on a reservation of the United States under § 959, the licensee was required to consent to having the rates it charged the government fixed by the Postmaster General. This Court didn't "believe that Congress ever intended to exact such conditions as part of the price of running a line across land in which the Government is interested only to the extent of holding title for the protection of an individual Indian allottee." (318 U. S. at p. 214)

It said that "H. R. Rep. No. 1850, 56th Cong. 1st Sess. indicates that the title of the Act, referring to public lands, was advisedly chosen." (318 U. S. at p. 212). The title of the Act was "An Act Relating to rights of way through certain parks, reservations and other public lands."

Cohen's opinion and the opinion of this Court in the *Oklahoma Gas* case read together show clearly that the term "public lands and reservations of the United States" includes only lands in which the United States owns a property interest.

Respondent's land, unlike that with which Cohen in his opinion and this Court in the *Oklahoma Gas* case were concerned, was never part of the public domain of the United States.

If the Secretary of Interior believed that respondent's land were part of the public lands and reservations of the United States he would undoubtedly long since have required the Niagara Mohawk Power Corporation to obtain a permit from him for its lines across the reservation.

The public lands and reservations referred to in § 4(e) of the Power Act are the same type of public lands and reservations covered by the Public Land Laws. Respondent's brief (Footnote 42, p. 63) erroneously seeks to give the

impression that the briefs of the Government and the Authority contend that § 3(2) of the Power Act in its definition of "reservations" includes only such land owned by the United States as the Public Land Laws reserve from private appropriation and disposal. This of course is not true. Government land has been reserved by treaty, statute and executive order and when so reserved is not subject to "*private appropriation and disposal* under the public land laws" (§ 3(2); see also § 3(1)).

Respondent's statement (brief, pp. 63-64) that under petitioner's interpretation of the term "reservation" the bulk of the Indian land in the United States would be excluded, is also untrue. It points out that the Pueblo Indians own in fee some 700,000 acres of land but neglects to compare this with the 52,000,000 acres of Indian land over which the Government through the Bureau of Indian Affairs exercises trust responsibility (1958 Annual Report of the Secretary of Interior, p. xxx). Pueblo land of course is in a category all by itself. (See Authority's Main Brief, pp. 55-56). And as pointed out by Mr. Justice Van Devanter in *United States* v. *Creek Nation*, 295 U. S. 103, 109 (1934), fee title in an Indian tribe is rare and is different from "the usual right of occupancy with the fee in the United States".

III

Respondent's Brief Contains Misstatements about The Legislative History of The 1957 Act and The Necessity of Using Respondent's Land for The Project.

1. Respondent's brief in notes 23 and 24 (p. 44) erroneously states that an Army engineer gave uncontradicted testimony at the House Public Works Committee hearings in 1956 to the effect that Niagara Mohawk Power Corporation owned all the land needed for the project. That engineer merely testified that Niagara Mohawk "gen-

erally" owned all the land needed for a smaller project. Contrary to respondent's brief the Power Authority witness who immediately succeeded him made it clear that Niagara Mohawk did not own all necessary land and testified that the Authority had power to condemn all the land needed for the project regardless of ownership. (R. 256-261, 289-290)

2. Respondent's brief in note 24 erroneously seeks to give the impression that the House Report on the bill which became the Niagara Redevelopment Act stated the project would have a reservoir of 22,000 acre feet and the Senate Report a reservoir of 30,000 acre feet. Both Reports made it clear that a larger reservoir would have to be built. (H. Rep. No. 862, 85th Cong. 1st Sess. pp. 5-7; S. Rep. No. 539, *id* pp. 5-6; R. 388). Contrary to the suggestion of the brief (p. 43) the exhibits presented in the 1955, 1956 and 1957 hearings of the House and Senate Public Works Committees, taken together, show clearly that an enlargement of the reservoir necessarily would take in land which is included in respondent's reservation.

3. Respondent's brief (p. 52) states that a Power Authority witness refused to testify that any member of Congress ever read Exhibits 191 and 218 but neglects to point out that the same witness at page 271 of the Record testified that every Senator who attended the hearing of the Senate Public Works Committee looked at Exhibit 191. A comparison of Exhibit 218 and the Congressional Record shows that several members read from Exhibit 218 in the House and Senate debates. (104 Cong. Rec. 13195-97, 13205-06, 14443-44)

4. Respondent's brief (p. 48) wrongly states that its lands were not needed in 1957 when the Niagara Redevelopment Act was passed. It says that the Authority's General Manager testified that the boundaries of the reservoir had not been determined in 1957. What the witness said was that the "*exact*" boundaries (R. 270) and the "*complete*" acreage (R. 274) were not known, although the general location had been determined. As a result of

the Schoellkopf disaster and the fact that a project large enough to use all Niagara water was to be built the Authority's Resident Engineer studied possible locations in the fall of 1956 (R. 109) and on the basis of that study it was determined by January, 1957 that the reservoir had to be partly on Tuscarora land (Ex. R. 35). Exhibit 191 published in January included such land in the reservoir.

5. Contrary to respondent's contention (p. 49), nothing which has happened since 1957 is responsible for the need for Tuscarora land. It has always been needed for a reservoir big enough for a project capable of using all Niagara water available by international agreement. Even with the higher dikes referred to by respondent (note 29) some Tuscarora land would be needed for a reservoir with 60,000 acre foot capacity although with higher dikes less Indian land would be necessary. What respondent's brief says about higher dikes in note 29 is not borne out by the record cited and is untrue (R. 3-11).

6. Respondent's statement (p. 51, note 31) that the Tuscarora did not "conclude" in 1957 that the Authority intended to appropriate their lands is untrue. Not only was a map showing the reservoir partly on Tuscarora land distributed to them but they were directly informed in January and February, 1957 that part of their land was required (Ex. R. 45, 46).

IV

Authorities Cited By Respondent Do Not Show That Specific Congressional Consent Is Necessary For The Taking Of Respondent's Land.

Respondent's brief repeatedly (pp. 17, 32, 33, 42, 55) cites *Elk* v. *Wilkins*, 112 U. S. 94 (1884) as authority for its contention that general statutes do not apply to Indians "unless so expressed as to clearly manifest an intention to include them".

Elk v. *Wilkins*, was, of course, a post Civil War case which held that the words in the 14th Amendment "all persons born . . . in the United States and subject to the jurisdiction thereof" did not include Indians. It denied an Indian emancipated from his tribe and living in the City of Omaha the right to vote. Congress took less than three years to overrule the result in Elk's case and by Act of February 8, 1887 (24 Stat. 388) gave Indians in his circumstances the right to vote. The general principle enunciated in the case and relied on by respondent has been overruled in many subsequent cases. *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943); *Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418 (1935); *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575 (1928); *People ex rel. Kennedy* v. *Becker*, 241 U. S. 556 (1916); *Becker* v. *Harvey*, 181 U. S. 481 (1901); *Albany* v. *United States*, 152 F. 2d 266 (6th Cir. 1945); *Bailey, et al.* v. *United States*, 47 F. 2d 702 (9th Cir. 1931); *Y-Ta-Tah-Wah* v. *Rebock, et al.*, 105 Fed. 257 (N. D. Iowa 1900).

Chouteau v. *Commissioner of Internal Revenue*, 38 F. 2d 976 (10th Cir. 1930), cited by respondent (p. 33) was in effect overruled by this Court in *Five Civilized Tribes* v. *Commissioner*, supra. *McCandless* v. *United States*, 25 F. 2d 71 (3rd Cir. 1928) and *United States* v. *2005.32 Acres of Land, etc.*, 160 F. Supp. 193 (D. C. So. Dak. 1958) also cited at page 33 of the brief both involved the question of whether treaty provisions had been overriden by Congress.

The statutes cited in respondent's brief in Note 17 (p. 34) do not show that property in an Indian reservation cannot be acquired without express Congressional consent. Two of the statutes (Act of May 17, 1957, 71 Stat. 31 and Act of February 28, 1919, 40 Stat. 1206) authorized municipalities to condemn land owned by the United States. Under the Act of May 10, 1926, 44 Stat. 498 a state was permitted to condemn land in which fee title was owned by the United States. The Act of March 7, 1928 (45 Stat. 200, 212-13) was passed to authorize abandonment by the Government

of a project it had started pursuant to the Act of May 10, 1926, 44 Stat. 464 and to enable the Federal Power Commission to license a private power company to construct the project.*

As recently as the building of the St. Lawrence Seaway-Power Project which has just been completed, land in the St. Regis Reservation in New York State was condemned by the Seaway Development Corporation under the most general type of condemnation statute (33 U. S. C. § 984(a)(8); 68 Stat. 94). *St. Lawrence Seaway Development Corporation* v. *88.57 Acres etc.* (Civil Case No. 6642, U. S. D. C. N. D. N. Y. 1957).

V

Respondent's Brief Is In Error With Respect To The Legislative History Of 25 U. S. C. § 233 And In Stating That Committees Of The New York Legislature Interpreted That Statute As Barring New York's Condemnation Of Indian Land.

The Power Authority contends that Congress has tacitly consented to New York's condemning Indian land as it has been doing since the founding of the republic.

Contrary to the statement in respondent's brief (p. 39) the 1957 Niagara Redevelopment Act does not direct that the Commission issue a license pursuant to the Federal Power Act but rather "in conformance with the Rules of Practice and Procedure of the Federal Power Commission".

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* Contrary to an erroneous suggestion on p. 58 of our main brief, 25 U. S. C. § 357 has been construed to allow the condemnation of allotted Indian land under state laws by private companies as well as by states and municipalities (*Nicodemus* v. *Washington Water Power Co.*, 264 F. 2d 614 (1959)). Nevertheless we were correct in saying that such land can be condemned under § 21 of the Power Act.

Under those Rules (18 C. F. R. 1.5(b)(3); 18 C. F. R. 4.41 (F)) an applicant for a license is required to state how it plans to acquire the use of land needed for a project other than that which it already owns. The Authority in its application alleged that it could condemn all needed land (no public lands or reservations of the United States being involved).*

Since the Commission may license the use of any land which the licensee has a right to condemn New York's right to do so is important and thus an interpretation of 25 U. S. C. § 233 (64 Stat. at 845) is also important. An interpretation of the statute is important for the further reason that respondent argues it has a bearing on the effect of the 1957 Niagara Redevelopment Act.

Contrary to the statements in respondent's brief (pp. 27-31), nothing in the legislative history of 25 U. S. C. § 233 (64 Stat. 845) indicates that the statute was intended to make any substantive change of law or to bar New York from continuing to condemn Indian land.

Respondent's brief (pp. 27-28) quotes from a 1950 Report of the Joint Legislative Committee on Indian Affairs of the New York Legislature which had drafted the legislation and procured its passage. Nothing in that report suggested that the legislation which the Committee had submitted to Congress would affect New York's powers of condemnation.

A report of the Committee put out this year makes reference to litigation between the Tuscarora and the Power Authority and states unequivocally that the Committee did not consider that Congress in enacting § 233 intended to

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* The rules require that the application state whether any public lands or reservations are involved. If there were government land at Niagara in an area needed for the project the 1957 Redevelopment Act would allow its use. Contrary to the statement in respondent's brief (p. 40) the land would not be condemned but compensation to the Government, if any, would be fixed by the Commission under § 10(e) of the Power Act.

interfere with the state's power of eminent domain (Report of September 23, 1959). The report on pages 5-6 says:

> "Those of the Committee who are most familiar with the legislative history of the Civil Jurisdiction Act of 1950 are surprised that there has been deduced from it a Congressional intent to restrict the State's power of eminent domain, which was upheld by a District Court while the legislation was pending. *United States* v. *Cattaraugus County*, 71 F. Supp. 413 (W. D. N. Y., 1947). That specific intent certainly would have been in a direction contrary to the general tendency of the Act. Of course it is the usual function of a proviso to express an exception to the general effect, but it is not usually a source of important affirmative legislation, and it was not so understood in the present instance while the legislation was being considered.
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> • • •
>
> "Nothing appears in all the history of the legislation to show that the provisos intended anything except to preserve the status in the specified areas. As to what the status was for present purposes it seems sufficient to quote what Senator Butler read into the record on March 9, 1948. He was Chairman of the Committee, a Subcommittee of which was holding a hearing on the bill, and he read from Assistant Commissioner Merritt's testimony in 1929:
>
> > 'I want to say, for the information of the committee, that the jurisdiction of the Federal Government over the Indians of New York is very limited indeed. In fact, our only jurisdiction up there is to carry out the treaty provisions of the Federal Government. Those Indians are practically independent of the Federal Government. We have practically nothing to do with those Indians. They are educated in the local schools. We do not attempt to supervise their lands.'*"
>
> "* Mr. Edgar B. Merritt was Assistant Commissioner of Indian Affairs and testified before a Senate Subcommittee. The quoted testimony appeared originally at page 4865 of a hearing of March 1, 1929. Senator Butler's reading of it is at page 20 on a hearing about the bill now involved."

Respondent's brief (p. 29) suggests that another New York legislative committee—the Special Legislative committee on Revision and Simplification of the Constitution—took the position that § 233 barred New York's condemnation of Indian land. In the first place, the staff report referred to makes no mention whatsoever of eminent domain either by the state or by any other entity. In the second place, the report was never approved by the Committee. The material in the report relating to Indians was written by the same man who wrote the Law Review article cited on page 31 of respondent's brief. Instead of adopting this and the other material contained in the report, all of which was prepared in connection with the possible revision of the State Constitution, the Committee merely submitted it to the legislative leaders and released it to the public. The Chairman in transmitting the report to the leaders and advising that he was making it public, said:

> "The Committee by so doing hopes to stimulate interest and discussion of the simplification problem and of eliciting comments, criticisms and suggestions which may be helpful to the Committee in appraising the report's findings and in otherwise discharging its special mandate on simplification."

There was nothing in the opinion of Assistant Attorney General Van Devanter (Ex. 250) referred to in footnote 13 (p. 31) of respondent's brief to suggest that New York did not have the power of eminent domain over Tuscarora land. What the opinion said—something of which there is no dispute in any quarter—was that 25 U. S. C. § 177 forbids the Tuscarora from leasing their land to private persons and that there is no federal statute which gives the Secretary of Interior or any other federal agency the right to supervise or approve the making of any such leases. He held that statutes allowing the Secretary to do so with respect to Indian land in the West did not apply to New York Indian land.

Conclusion

The judgment under review should be reversed and the court below directed to dismiss the petition for review or to affirm the order of the Commission under review.

Respectfully submitted,

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